No.....

Supreme Court of the United States

OCTOBER TERM, 1955

A. J. JACKSON, as Trustee in Bankruptcy of DALE R. PETERSON & CO., INC., *Petitioner,*

v.

E. FERMIN FLOHR, EDWARD E. FLOHR and L. CARLOS FLOHR, d/b/a FLOHR & CO., METAL FABRICATORS, *Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, A. J. Jackson, as Trustee in Bankruptcy of Dale R. Peterson & Co., Inc., respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered June 23, 1955, rehearing of which was denied September 29, 1955, all of which sustained in part the judgment of the United States District Court for the Western District of Washington, Northern Division, entered February 18, 1954. This petition is based on the following grounds:

(1) The Circuit Court decision is in direct conflict with another decision of the Ninth Circuit, and with decisions of other Circuit Courts.

(2) The Circuit Court decision has decided an im-

portant question of local law in direct conflict with an applicable local decision; and

(3) The question is a substantial one involving important issues of local law.

WHEREFORE, for the reasons hereinbefore and hereinafter stated, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this court, directed to the United States Court of Appeals for the Ninth Circuit, commanding said court to certify and send to the Supreme Court the transcript of the record in the above-entitled cause and all the proceedings in the United States Court of Appeals, to the end that said cause may be reviewed and determined by this court and the judgment of the Circuit Court of Appeals for the Ninth Circuit reversed and judgment entered for the petitioner, against the respondents, for the sum of $3,154.50.

OFELL H. JOHNSON,

WILLARD HATCH,

CROSON, JOHNSON & WHEELON,

Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1955

A. J. JACKSON, as Trustee in Bankruptcy of DALE R. PETERSON & CO., INC., *Petitioner,*

vs.

E. FERMIN FLOHR, EDWARD E. FLOHR and L. CARLOS FLOHR, d/b/a FLOHR & CO., METAL FABRICATORS, *Respondents.*

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

PREVIOUS OPINIONS

The decision of the Circuit Court of Appeals for the Ninth Circuit has, at this writing, not been reported. The full contents of the decision are attached as Appendix A. The Judgment of the Circuit Court is attached as Appendix B.

The decision of the U. S. District Court, Western District of Washington, Northern Division, has not been reported. The full text of the decision is contained on pages 15-21 of the transcript. The judgment of the lower court is contained on page 22 of the transcript.

The decision of the Circuit Court which petitioner contends is in direct conflict with the decision herein is *San Mateo Feed & Fuel Co. v. Hayward,* 149 F.(2d) 875.

The decision of another Circuit Court with which the present decision is in conflict is *Swarts v. Fourth National Bank,* 117 Fed. 1.

The decision of the State of Washington Supreme Court which petitioner contends is in direct conflict with the decision herein is *Seattle Association of Credit Men v. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892.

JURISDICTION

Jurisdiction in the District Court was based on the facts alleged in Paragraph II and IV of the Amended Complaint (Tr. 3, 4) and upon 11 U.S.C., §46, and 11 U.S.C., §110(e) (3).

The District Court, having entered an Order granting Summary Judgment to the respondents (Tr. 22), jurisdiction in the Court of Appeals was based on 28 U.S.C., §§1291, 1294, and 11 U.S.C., §§47 and 48.

Jurisdiction in the Supreme Court is based on 28 U.S.C., §1254, and 11 U.S.C., §47.

STATEMENT OF THE CASE

During the year 1951, the bankrupt, a corporate building contractor, performed construction work in the State of Washington on a building owned by Williamson and on a residence owned by Favre. Respondents (metal fabricators) furnished labor and materials for each job at the request of the contractor and gave the five-day notice to the owners required by the Washington Mechanics Lien Law, R.C.W. §§60.04.010 *et seq.* Within the ninety-day period allowed by law for filing liens but without the liens ever having been filed, respondents received payment of their accounts. The Williamson account, in the amount of $2,424.50, was

paid by check drawn by Williamson and made payable jointly to the contractor and respondents. It was accepted by respondents after endorsement by the contractor. On the Favre account, the respondents received $730.00 by check issued directly by the contractor. Both payments took place within the four-months period next prior to the application for appointment of a state court receiver for the contractor, throughout which period the contractor was insolvent. Both payments were made on account of debts existing prior to the start of the four-months period. No credit was subsequently extended by respondents to the contractor.

After the appointment of the state court receiver, an application for involuntary bankruptcy of the contractor was made, and petitioner was subsequently appointed Trustee.

The case was heard in the District Court on respondents' Motion for Summary Judgment and was submitted to the court as a Motion for Summary Judgment joined in by petitioner. The facts were not in dispute. The District Court denied petitioner's motion and granted respondents' motion. The Circuit Court affirmed the District Court on the Williamson account and remanded the case for trial on the Favre account.

SPECIFICATION OF ERRORS

1. The Circuit Court erred in affirming the District Court as to the payment of $2,424.50.

2. The Circuit Court erred in remanding the portion of the case referring to the payment of $730.00 for trial.

3. The Circuit Court erred in denying petitioner judgment on his Motion for Summary Judgment.

ARGUMENT

Summary

It is petitioner's contention that under the prevailing law and statutes of the State of Washington, a payment made by a bankrupt corporation is preferential, and hence voidable, if made within four months next prior to the application for appointment of a state court receiver, for or on account of an antecedent debt, to a materialman holding a valid, inchoate lien on the real property of some person other than the bankrupt.

1. The Washington Law

(a) Statutes

In order more fully to understand the issues raised by this petition, it is necessary to start with the provisions of the Bankruptcy Act under which this action was brought. §70(e) (1) [11 U.S.C., §110(e) (1)] of the Bankruptcy Act, reading as follows:

> "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title shall be null and void as against the trustee of such debtor."

provides recourse by a Trustee in Bankruptcy to the provisions of Washington law contained in R.C.W., Chapter 23.48, the pertinent portions of which are as follows:

"R.C.W. 23.48.010(3). 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class."

"R.C.W. 23.48.010(1). 'Receiver' means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation."

"R.C.W. 23.48.030. Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by the receiver. No preferences made or suffered prior to such fourth months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond the four months' period are hereby specifically superseded."

Respondents have raised the sole defense that they are excluded from the effect of these statutes because of the mechanics lien law of Washington and certain unrelated criminal statutes, all of which are set out in Appendix C.

(b) The *Daniels* Case Decision

Petitioner contends, and respondents agree, that under the doctrine of *Erie R.R. v. Tompkins,* 304 U.S. 64, 82 L.ed. 1188, the federal courts are bound to apply the law of the State of Washington to the solution of this particular problem, insofar as such law has

been expressed or can be determined. This includes both statute and case law.

The only case which either party has been able to find in Washington which states the law of Washington is *Seattle Association of Credit Men v. Daniels*, 15 Wn.(2d) 393, 130 P.(2d) 892, decided in 1942. Because of the importance of this case, petitioner sets forth a major portion of the decision as follows:

> "June 29, 1940, Eba's, Inc., made an assignment for the benefit of creditors to Seattle Association of Credit Men. The assignee brought this action to recover, as a preference, a payment of $280.23 made by the assignor to the defendants, Daniels and Turnquist, on April 10, 1940.
>
> "The facts out of which the controversy arose are as follows: On or about February 9, 1940, Eba's Inc. entered into a contract with the defendants, who are building contractors, for the repair and alteration of the store front of premises occupied by the former at 500 Queen Anne avenue in Seattle. The work was done 'on time and material basis plus 10% for overhead and profit.' Payment was to be made *'upon presentation of receipted bills and payroll * * * and when said bills for materials and payroll have been audited and found correct to be paid in full'* (Italics by Court). The work was completed about February 15th. On March 22nd, defendants presented a statement, accompanied by receipted bills for labor and materials, amounting to $280.23. On the same day, the president of Eba's Inc. made the following notation on the statement 'O.K. Pay about 10th of month.' Accordingly, under date of April 10th, a check was issued in payment of the account.

"In addition to the foregoing facts, the trial court found that Eba's Inc. was in possession of the premises under a lease giving it the right to make alterations and repairs on the building up to one thousand dollars, and that, *'if such repairs were made the lessee would pay a reduced rent to reimburse itself for said repairs'* (Italics by Court); that the president of Eba's Inc. discussed with, and had the consent of, the owner 'the making of the said repairs by said Daniels & Turnquist'; that, if Daniels and Turnquist had not received payment as provided for in the contract, they 'could have liened the said premises as security for the payment of the said sum due them.' Accordingly, under the rule that *a payment made by an insolvent to discharge a lien against its property does not constitute a preference* (Italics by petitioner), the court entered judgment dismissing the action. Plaintiff appeals.

"The appeal presents two questions for determination: (1) whether respondents had a lienable claim against the property; and (2) whether the payment can be regarded as having been made for a present consideration rather than upon an antecedent debt.

"(1) *First.* If respondents had an enforcible lien, even though inchoate, for the work performed and materials furnished, the payment was not a preference. 4 Remington on Bankruptcy (4th ed.) p. 648, §1709; *In re Lynn Camp Coal Co.,* 168 Fed. 998; *Stewart v. Hopkins,* 30 Ohio St. 502 (affirmed 104 U.S. 303, 26 L.ed. 769); *Public Nat. Bank & Trust Co. v. Fortinberry,* 53 S.W.(2d) (Tex. Civ. App.) 113.

"(2, 3) We think, however, that respondents did not have an enforcible lien. In the first place,

the lease under which the court found Eba's Inc. to be in possession of the premises did not run to Eba's as lessee. The named lessee was Dutch Maid Foods Inc. The lease provided that 'the lessee may assign this lease to Eba's Mutual Groceries, Inc., * * * and, upon acceptance of such assignment by and agreement of said company to perform the covenants of this lease, the lessee hereunder shall be released from all liability under this lease.' Whether Eba's Mutual Groceries, Inc. and Eba's Inc. are one and the same corporation does not appear from the record. Assuming that it is, however, the assignment provided for in the above quoted clause was never consummated by an agreement of Eba's Inc., 'to perform the covenants of this lease.'

"So, *as far as Eba's Inc. is concerned, there was no interest in the realty upon which a lien could be levied* (Italics by petitioner). For, at best, it was but a month to month tenant of Dutch Maid Foods Inc. But it is suggested by respondent that the latter and Eba's Inc. should be regarded as one and the same corporation because the stock of each corporation was owned by one and the same person. The evidence, however, falls far short of the requirements of the rule permitting corporate entities to be disregarded. To invoke that rule, something more than common ownership of stock and common management must be shown.

" 'In order to justify the judicial disregard of corporate identities, one, at least, of two things must clearly appear. Either the dominant corporation must control and use the other as a mere tool or instrument in carrying out its own plans and purposes so that justice requires that it be held liable for the results, or there must be such

a confusion of identities and acts as to work a fraud upon third persons.' *Pittsburg Reflector Co. v. Dwyer & Rhodes Co., Inc.,* 173 Wash. 552, 555, 23 P.(2d) 114.

"There is no such proof in this record. *We are of the opinion, therefore, that Eba's Inc. had no lienable interest in the realty.*" (Italics by petitioner)

As will be readily noticed from the portions of the decision italicized by petitioner, the Washington Supreme Court said in three different parts of the opinion that the lien, to be of such a nature as to save it from the effect of the preference act, must be against the property of the insolvent. In the present case, the liens claimed by respondents were *not* against the property of the bankrupt. To petitioner, the *Daniels* case is clear and convincing authority from the State of Washington supporting his position.

(c) The *Daniels* Case Briefs

To more fully understand the background of the *Daniels'* decision, petitioner has made a thorough investigation of the briefs filed with the Supreme Court of the State of Washington. On page 36 of the brief of appellant, Seattle Association of Credit Men, appears the following argument:

"Even if respondents could have impressed a lien on the premises—and such an assumption is pure speculation—such a fact would be immaterial, since the premises never came into the possession of the assignee herein to be administered as assets of the insolvent corporation. Liens operate *in rem* and not *in personam,* following the *res* and not the person, and when the person or his

assignee is separated from the property and claims no interest in it, the fact that the lien claimant could have placed a lien on the *res* becomes immaterial to the person. The lien, not following the person, does not become a lien on his other assets or property, or that portion of which passed to his assignee.

"'Where property on which taxes were assessed by a city against a bankrupt never came into the hands of the trustee, the city is not entitled to a lien on the bankrupt's assets for the payment of such taxes. *Waco v. Bryan,* 127 Fed. 79.

"And again, in an Indiana case, where the lien statute involved was much similar to ours, it was held, in *In re Hammond Interior Finish Co.,* 13 Fed.(2d) 578:

"'(Syl. Under Burns Ann. St. Ind., 1926, §§ 9831, 9832, person furnishing labor and material to a bankrupt, who owned neither land nor building, not having lien on personal property sold by trustee, was not entitled to priority.'

"From the foregoing cases, it follows that even though respondents had had a lien on the premises, since those premises did not come into the possession of the assignee herein, respondents would have had no priority rights, or in other words, would have been in no different position than any other general creditor of the insolvent corporation."

These words from the brief of the prevailing party in the *Daniels* case support fully our contention that the decision of the Supreme Court of Washington was based on the premise that the lien of a materialman

must be against the property of the bankrupt and not against the property of some third person in order to have payment of the lienable item excluded from the effect of the Washington Preference Act.

The briefs in the *Daniels* case further support our position. In respondent Daniels' brief, there is cited a decision of a bankruptcy Referee in Kansas in 1934, *In the Matter of John J. Conrad, Bankrupt,* 26 A.B.R. (N.S.) 600. This case holds squarely with the position contended for by respondent Daniels and would have been excellent authority for the Washington Supreme Court on which to base an affirmance for the respondent Daniels, but the Supreme Court ignored that decision entirely in reversing the Superior Court and followed the argument of the appellant, Seattle Association of Credit Men, quoted above.

2. Other Authorities Supporting Petitioner

The most important case from other jurisdictions which supports petitioner's position is the case of *San Mateo Feed & Fuel Co. v. Hayward* (C.C. A. 9th) 149 F.(2d) 875, from which petitioner sets forth the following lengthy quotation:

> "DENMAN, Circuit Judge.
>
> "This is an appeal from an order of the district court affirming and adopting an order of the referee requiring appellants to turn over to the trustee in this bankruptcy proceeding the sum of $1,025.35 from the San Mateo Feed & Fuel Co. and the sum of $2,534.76 from H. E. Casey Company.
>
> "The evidence shows that within the four months of the adjudication in bankruptcy the

bankrupt delivered checks in the above amounts, respectively, to each appellant, at which time he had an indebtedness to each in a sum greater than the amounts of the checks. The evidence also support findings that each appellant at the time of the delivery of the checks has reasonable cause to believe that the bankrupt was insolvent.

"The principal controversy here concerns the character of the checks. The bankrupt was a plaster contractor in the construction of a building. The appellants were materialmen furnishing plastering materials for the building to the contractor for which, under the California law, they had liens on the building. The checks were for amounts owed by the owner to the contractor and payable within the four months' period. Each check was made payable jointly to the contractor and one of the materialmen. The contractor delivered the check to the materialman named in the check, who credited the contractor on his antecedent debt for its amount.

"As we understand appellants' contentions they are, in effect (a) that since the materialmen's lien disappeared to the extent that the debt for the materials was lessened by the payments, there was a detriment to the materialmen which constituted a present consideration for the delivery of the checks; and (b) the checks were in fact paid under an agreement made long before the four months' period between the materialmen, the owner, and the contractor, by which the contractor agreed that the owner should pay the materialmen for the materials delivered to the building out of the amounts due from the owner to the contractor when they became due, and hence the delivery of the checks was a transaction between the owner and the ma-

terialmen in discharge of an obligation of the former to the latter.

"(1)(a) With regard to the first contention, *the lien extinguished was not upon the property of the bankrupt* (Italics by petitioner) and hence its extinction caused no increase in the bankrupt's estate. The materialmen would be preferred over the other creditors by the reduction of the bankrupt's indebtedness to them, in which the removal of the burden of litigating or otherwise enforcing the lien is a beneficient incident.

"(2)(b) With regard to the claimed prior agreement that the checks were delivered in payment of a direct obligation of the owner to the materialmen, assuming that such a payment would not be a preference, the evidence does not show such an agreement was made. There is evidence that it was the practice of the materialmen to require of the owner that the checks be made out jointly to the contractor and the materialmen and that both owner and contractor had acquiesced in the practice.

"There is no evidence of an agreement that the practice was to continue or that the owner had agreed to pay the materialmen for the material. That is to say, if the owner's check had omitted a materialman as joint payee, the latter could have recovered from the owner for the value of the material. The practice shown undoubtedly lessened the likelihood of the contractor using the payments from the owner for other purposes than discharging the debt for the materials used in the building. It thus was a convenience to the owner to keep his property free from material liens and, as said, a beneficience to the materialmen not to have to enforce their liens, but it was no more."

The force of the *San Mateo* decision in support of petitioner's position that the lien must be against the bankrupt's property cannot be denied.

3. Analysis of the Circuit Court Decision

A thorough analysis of the split decision of the Circuit Court is necessary to a more complete understanding of this case. The Circuit Court in its decision apparently found the *Daniels* case, *supra,* inequitable and unpalatable. To avoid the effect of this case, the Court searched for other cases in Washington on which to bottom its decision.

The cases cited by the court on page 4 of its opinion (Tr. 36) do not seem to change the import of the *Daniels* case. The *Williams* case (133 Wash. 121) involves a criminal statute. The *State Manufacturing* case (1 Wash. 609) is limited to the proposition that the agency of the contractor is solely for the purposes of establishing a lien. The *Simpson* case (108 Wash. 82) covers only the question of payment of lien claims by an owner. The *Whiting* case [7 Wn.(2d) 804] and *Luster* case [37 Wn.(2d) 192] involve secured transactions and present consideration. The *Terhune* case (132 Wash. 208) concerns secured transactions by insolvent corporations and the *Northwest Hardware* case (132 Wash. 413) considers the nature of an alleged secured claim.

The net effect of the citation of these cases appears to be thus: that even if the *Daniels* case should be read in favor of petitioner, the Supreme Court of Washington, according to the Circuit Court, would not apply the *Daniels* case to the present facts because (1) of some

agency-trust relationship and (2) because there was no transfer of the insolvent's assets.

(a) The Agency-Trust Exception

If the agency-trust exception were to be allowed in all preference actions involving insolvent contractors and their materialmen, there could never be a preference regardless of whether the materialman gave the five-day notice, filed a lien within 90 days of completing his work, or began suit to foreclose a lien within eight months after filing his lien. Yet the Circuit Court recognizes (Tr. 39) that a lien can be lost in each of these instances so that no defense of preferred status could be raised. How can these views be reconciled?

The agency-trust exception is apparently created by combining the Washington criminal statutes (R.C.W. §9.54.080) and the Washington lien statutes (R.C.W. §60.04.110) (Appendix C). Granted, the lien statute does make the contractor the agent of the owner—*but only for purposes of establishing the lien,* not for purposes of making the owner personally liable for the materials. In *Blossom-Provine Lumber Co. v. Schumacher,* 147 Wash. 369, 266 Pac. 167, the Court said:

> "It will be noticed that the statute (R.C.W. §60.04.110) does not make the contractor the agent of the owner for any other purpose than that of establishing the lien. Under such a statute, no right exists to enter a personal judgment against the owner."

To read the criminal statute (R.C.W. §9.54.080) into the lien statute would pervert the entire theory of lien law as established in the *Schumacher* case. It would

make the contractor the agent of the owner for all purposes and would permit the materialman to sue the owner directly under principal-agent law without regard to a five-day notice, a claim of lien or statutes regarding the life of a lien. It would make the lien statute superfluous. Such is not the intent of the Washington law and has never been claimed by any materialman in any reported decision. Criminal law concepts have no application in this case. They should not be resorted to for establishment of civil rights and duties. Yet without the agency concept created by criminal law, no trust can be made out.

(b) The Transfer Concept

The decision of the Circuit Court also turns on the fact that the *Daniels* case can be distinguished because here, no transfer of the insolvent's assets took place, hence there was no depletion of the insolvent's estate. With this conclusion, we likewise cannot agree.

On the date of this particular transaction, the insolvent had an asset in the form of an account receivable due and owing from Williamson in at least the sum of $2,424.50. When Williamson issued his joint check payable to Peterson and Flohr he paid that account receivable just the same as if he had turned the cash over to Peterson. Peterson's claim against Williamson was thereupon reduced by $2,424.50. Peterson then took that sum out of its assets and paid it over to Flohr, by endorsing the check. When the transaction started Peterson had an asset of $2,424.50. When the transaction was completed, Peterson's assets were

reduced or depleted by a comparable sum. The endorsement of the check by Peterson constituted an assignment to Flohr of Peterson's account receivable from Williamson to the extent of $2,424.50. If it were not to be treated as a payment of Peterson's account by Williamson, why bother to name Peterson as a payee on the check?

We would agree that had Peterson not been named on the check and had it not been endorsed by Peterson, Peterson would still have had his account receivable against Williamson and there would have been no depletion. But such was not the case. The minute Peterson was named on the check the money belonged to Peterson even though to get its value, Flohr also had to endorse the check. The Trustee did not have to prove "any of the property of the corporation was so transferred" beyond the allegation that the insolvent "paid" the Flohrs' debt.

Finally, it should be remembered that the test of depletion for purposes of determining if a preference was received is whether a reduction in assets took place, not a reduction in net worth. Every preference reduces assets but has no effect on net worth.

The *Newport Bank* case (225 U.S. 178), cited by the Circuit Court (Tr. 37) (Footnote 9), upholds the proposition that the circuity of the payment is not an absolute defense:

> "To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit."

The other cases cited by the court (Footnote 9) (Tr.

37) are not applicable because there was no depletion, as in the present case.

The conclusion reached in Footnote 21 (Tr. 42) does not seem accurate. By endorsing the check, Peterson admitted payment of its account *pro tanto*. How then could Peterson be said to have a right of action against Williamson for this amount? The endorsement on the check would be an absolute defense. Certainly, there was no exchange of values.

(c) The Direct Payment Concept

On page 8 of its opinion (Tr. 40) the Circuit Court has concluded that even if there were a transfer of Peterson's assets, still there was no preference because (1) a direct payment by Peterson would not have been a preference and (2) Flohr was not in the same class as other creditors.

If a direct payment by Peterson would not have been a preference, this court could have simply held that the *Daniels* case was not authority for the proposition cited by appellant. Such a simple holding would have made the decision clear and unconfusing. It would have made the vacation of the portion of the District Court order referring to the Favre case unnecessary. We cannot believe that the court meant that such a payment would not have been a preference.

(d) Class of Creditors

If Flohr be held to be in a different class of creditors, then Flohr must be a secured creditor since such is the only other class outside of unsecured, non-prior creditors. Such a decision is squarely contrary to *Swarts v. Fourth National Bank,* 117 Fed. 1, which stated:

"While it is true that the bankrupt act does not define the word 'class' nor in turn state what creditors are in the same class, it creates some or specifies others, and it seems to us that the meaning of the word 'class' in the act should, if possible be derived from the statute itself. Section 64 after directing the payment of certain expenses of administration, creates three classes of creditors, parties to whom taxes are owing, employees holding claims for certain wages, and those who, by the laws of the states or of the United States, are entitled to priority. Sections 56 (b), 57 (e) and 57 (h) provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats.

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from other than the bankrupt. Their relations to third persons, their right to collect of others, the personal security they may have through endorsements or guarantees, receive no consideration, no thought."

The test of whether a creditor is secured or not is made from the bankrupt's point of view, not from the creditor's position.

In §1(28) [11 U.S.C., §1(28)] of the Bankruptcy Act appears the following definition:

" 'Secured creditor' shall include a creditor who has security for his debt *upon the property of the bankrupt* of a nature to be assignable under this

> Act or who owes such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets." (Italics by petitioner)

Note that a secured creditor for bankruptcy purposes is not any creditor with security, but only a creditor with security directly or indirectly from the bankrupt. See *Gorman v. Wright,* 136 Fed. 164.

Thus, while a secured creditor who took his security from the assets of the bankrupt before the start of the preference period, may receive payment during the preference period without fear of "blow-back," the creditor with security on the assets of some third person may not receive payment during the four months' period and still be entitled to call himself "secured."

The Washington statute on preferences contains no definition of "transfer" or "secured creditor," nor does it contain an equivalent to §67(b) of the Bankruptcy Act [11 U.S.C. 107(b)]. It is presumed, however, by virtue of *Stern v. Lone,* 32 Wn.(2d) 785, 203 P.(2d) 1074, that similar provisions would be written into the Washington Act by the Washington courts.

(e) The *San Mateo* Case

In Footnote 19 (Tr. 42), the Circuit Court also holds the *San Mateo* case [149 F.(2d) 875] inapplicable. While conceding it was a bankruptcy preference case, that alone does not make it inapplicable. The California and Washington lien laws are comparable insofar as this controversy is concerned. Nor does the *San Mateo* case seem to overrule other Ninth Circuit decisions. The *Malott* case [4 F.(2d) 770] involved a situa-

tion where the lien had expired long before bankruptcy, and in fact the lien had never been properly perfected. The *Street* case [70 F.(2d) 68] involved subrogation law under suretyship, which is an entirely different proposition than that considered here.

Petitioner feels that the *San Mateo* case cannot be lightly disregarded. In our opinion, this decision is squarely in conflict with the *San Mateo* case and impliedly overrules the same. If the *San Mateo* case is to be overruled, it should be done directly.

(f) Failure of Proof

In Footnote 20 (Tr. 42), the Circuit Court has set forth numerous failures of proof by petitioner, to-wit: proof of transfer, proof that Flohr obtained a greater percentage of debt than other creditors in Flohr's class. However, all of these items were pleaded in petitioner's amended complaint (Tr. 6). On respondent's motion for Summary Judgment, the allegations of fact alleged by petitioner were admitted. *Downey v. Banker,* 32 F. Supp. 874. No further proof was required.

If such were not the case, is there sufficient basis for the District Court's order on the Williamson phase any more than on the Favre phase? Should not the whole matter be sent back for trial because genuine issues of fact remain? Can a trust be held to exist merely because of agency grafted on to the lien law from criminal statutes?

(g) The Favre Payment

While petitioner believes there is ample ground for making a decision on the Favre payment, he does be-

lieve that, if the case must be tried, it should be solely on the ground that there are genuine issues of fact to be heard. That portion of the decision represented by the last paragraph on page 11 of the decision (Tr. 43) should be deleted for the reason that it furnishes to the respondents *obiter dicta* on which to found their proof and practically prevents petitioner from appealing again on this phase of the case, if necessary.

CONCLUSION

Petitioner contends, therefore, that a Writ of Certiorari should be issued to the Circuit Court for the following reasons:

(1) The present decision of the Circuit Court leaves the Ninth Circuit with two cases similar in facts but with diametrically opposed decisions. Either the *San Mateo* case, *supra,* must be expressly overruled or the present case must be reversed.

(2) The decision of the Circuit Court is in conflict with decisions of other Circuit Courts on the definition of secured creditors.

(3) The present decision of the Circuit Court avoids the clear holding of the Supreme Court of the State of Washington in the *Daniels* case, *supra,* and thereby decides a question of state law in direct conflict with the previously announced state rule.

(4) Petitioner would never have brought his case in the Federal courts had he not believed that the *Daniels* case, *supra,* was a clear interpretation of the Washington rule as applied to the facts herein, nor would the petitioner have brought this case in the Federal court

had he not felt that the Ninth Circuit had already decided a similar case on similar facts in petitioner's favor, to-wit, the *San Mateo* case, *supra*. It is worthy of note that the only Washington-trained Judge on the Circuit Court dissented from the majority opinion in this case.

Finally, it is urged that the fact that the position taken by petitioner appears to create an inequitable situation is no justification for ignoring the plain intent and meaning of the law as laid down by the Supreme Court of the State of Washington.

Respectfully submitted,

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APPENDIX A

DECISION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. J. JACKSON, as Trustee in Bankruptcy of Dale R. Peterson & Co., Inc., *Appellant,* vs. E. FIRMIN FLOHR, EDWARD W. FLOHR, and L. CARLOS FLOHR, doing business as Flohr & Co., Metal Fabricators, *Appellees.*	No. 14293 Jun. 23, 1955

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: BONE, FEE and CHAMBERS, Circuit Judges
JAMES ALGER FEE, Circuit Judge:

Jackson, Trustee for Dale R. Peterson & Co., Inc., a bankrupt building contractor, sought in this cause in a United States District Court to recover under Washington statutes moneys previously received by the Flohrs, metal fabricators and subcontractors, who had furnished labor and materials on two jobs for which the Peterson company was the general contractor.

The Trustee chose to ground his attack upon the Flohrs under 11 U.S.C.A. §110(e)(1), which gives a trustee the right to recover any money transferred under circumstance which rendered the transaction void-

able by state law.[1] The Trustee, having a choice of forum, filed this action in federal rather than state court.

Specifically, the Trustee sought $2,424.50, received by the Flohrs on account of Peterson's "Williamson job," and $730.00, on account of the "Joe Favre job," before the adjudication of bankruptcy of Peterson company. The particular statute of the State of Washington relied upon is found in Sections 23.48.010(1) and (3) and 23.48.030 of Remington Code of Washington, which read as follows:

> "R.C.W. 23.48.010(1). 'Receiver' means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation."
>
> "R.C.W. 23.48.010(3). 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class."
>
> "R.C.W. 23.48.030. Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by the receiver. No preferences made or suffered prior to such four months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference

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[1]"The present case is brought under 70(e) (11 U.S.C. 110(e)) of the Bankruptcy Act and invokes state law and not federal law." Appellant's brief, pages 22-23.

made beyond the four months' period are hereby specifically superseded."

On May 16, 1952, Peterson company suffered the appointment of a receiver in a Washington state court. (This fixes the critical date for preferences here as January 16, 1952.) Subsequently, on June 18, 1952, a petition in involuntary bankruptcy was filed against the company, and on July 24, 1952, adjudication of bankruptcy was made. Finally, Jackson was appointed Trustee on August 21, 1952.

A recital of facts apparently assumed by the trial court in entering summary judgment against the Trustee on each claim follows. Both payments to Flohrs occurred after January 16, 1952. The Favre payment of $730.00 was made by Peterson company itself direct to Flohrs. The Williamson payment was made by a check in the amount of $2,424.50, drawn by Williamson, the owner, which was payable to Peterson company and Flohrs jointly. After securing the endorsement of Peterson, Flohrs cashed the check. A critical fact as to both payments is that, under the Washington statutes, Flohrs, as subcontractors, had a materialmen's lien against Williamson and Favre properties, respectively. The necessary five days' notice to charge each of these properties before commencement of work had been given. The 90-day period after completion for perfecting the lien had not expired in either instance. Peterson delivered the last materials to the Williamson property on December 26, 1951, and to the Favre property on November 12, 1951.

The trial court said these payments were not preferences. Whether or not this solution was correct must

necessarily depend upon Washington law because that is the source of the right plaintiff asserts.[2] Both parties place reliance upon the case of Seattle Association of Credit Men v. Daniels, 15 Washington 2d 393. If that case were identical, our task would be easy, but, of course, if this case were the same, the parties would not be here.

A thorough examination of the Daniels case and all Washington authorities does not bring forth any case that is conclusive of our question. Naturally, any determination here made evaporates as soon as the Washington courts announce a decision of the precise point upon which we are called to rule. We are aided in our determination by the expressions of the Washington courts, so it cannot be said that we plow virgin soil and need pay no attention to what Washington has said. We must try to conclude what the Washington Supreme Court would do here in the light of its decisions.

Therefore, the discussion which follows is bottomed upon our reading of the Daniels case, as well as we can read it, and an examination of all Washington cases that seem apropos. Making due allowance for various changes in the Washington statutes, we have been strongly influenced by the underlying principles discussed in State v. Williams, 133 Washington 121, 233 P. 285; State Manufacturing & Lumber Co. v. McChesney, 1 Washington 609, 21 P. 198; Simpson v. Sisters

[2]The only question is whether the payment by Williamson, the owner, to Flohr, the lienor, by a check made payable jointly to the bankrupt and Flohr, which was promptly endorsed by the bankrupt over to Flohr, was a "transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt * * * which, under any * * * State law applicable thereto, is * * * voidable for any other reason by any creditor of the debtor * * *." Bankruptcy Act § 70(e) (1), 11 U.S.C.A. § 110(e) (1).

of Charity of the House of Providence, 108 Washington 82, 182 P. 937; Whiting v. Rubinstein, 7 Washington 2d 204, 109 P.2d 312; Terhune v. Weise, 132 Washington 208, 231 P. 954; Seattle Association of Credit Men v. Luster, 37 Washington 2d 192, 222 P.2d 843; and Northwest Hardware Co. v. M. & S. Logging Co., 132 Washington 413, 232 P. 274.

As to the Williamson payment, we uphold the determination of the trial court thereon.

The construction of the federal Bankruptcy Act is not involved except insofar as the statutes of the State of Washington are thereby adopted as the criteria of avoidable transfers. As this Court understand the the facts, there was no transfer made and no lien in existence within the federal penumbra of bankruptcy. There was no allegation or attempt to prove that the Flohrs, at the time these payments were received by them, "had reasonable cause to believe the bankrupt insolvent." See 11 U.S.C.A. §96. The sole question then was whether these two separate payments were denounced by the law of the state. There are three statutes of Washington which must be scrutinized. (1) the act as to avoidable preferences;[3] (2) the lien laws;[4] and (3) the enactments which constitute the contractor an agent for the owner.[5] The burden was on the Trustee in each instance.

Under R.C.W. 23.48.010, "a transfer of any of the property of such corporation" is denounced. Here none

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[3]Revised Code of Washington, §§ 23.48.010 (1) and (3), 23.48.030.

[4]R.C.W. §§ 60.04.010, 60.04.050; Laws of 1893, ch. 24, § 18.

[5]R.C.W. §§ 9.54.010, 9.54.080, 60.04.010, 60.04.110.

of the property of Peterson company was transferred. The money belonged to Williamson, the owner. The lien was on the realty of Williamson. Irrespective of the validity of the lien, his intention to prevent a cloud on his title is clear. The money was his. Williamson had a right to direct the application thereof.[6] If the money had been paid direct from Williamson to the Flohrs, the contractor would have had no claim against the owner for this sum.[7] He could have used one of the officers of Peterson company as a messenger to carry the cold cash to the Flohrs.[8] The mere endorsement of the check did not pass the fund in the estate of Peterson company.[9] The making of the check to Peterson and

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[6]"A materialman or laborer has a lien notwithstanding payment to the contractor." Spokane Manufacturing & Lumber Co. vs. McChesney, 1 Washington 609, 21 P. 198.

[7]Nor would the appellant-trustee, standing in the stead of the bankrupt-contractor, have any claim against the Flohrs for money directly paid, because "It is well settled that payments by third parties of their own money do not constitute preferences." Re Zaferis Bros., Ltd., 9 Cir., 67 F.2d 140, 141.

[8]"The first thought is that a payment cannot be a preference unless the debtor makes it, or someone makes it for the debtor, and out of his estate. In other words, a payment made by a third person with his own money cannot be the debtor's preference because it does not come from the debtor's estate, which necessarily remains of the same size after the payment as it was previously. Even if the person who makes the payment acquires thereby a right to reimbursement, that does not increase the debtor's liabilities, for the new claim replaces an old one that otherwise could have been asserted * * * The result is the same, in that the debtor's estate was not altered by the transaction, nor are the legal consequences different merely because B [the payor] chose to use the debtor as a trusted messenger." Garrard Glenn, Fraudulent Conveyances and Preferences, Revised Edition, Vol. Two, ch. XXII, § 403.

[9]"It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to a payment of a creditor's claim, so that thereby the estate is depleted * * *." Newport Bank vs. Herkimer Bank, 225 U.S. 178, 184. "Circuity of arrangement such as payment through a third person will not defeat the right of the trustee to set aside the prefer-

the Flohrs jointly was simply to furnish evidence that the contractor knew of and acquiesced in the payment. The endorsement by Peterson company is evidence that the contractor also intended that Williamson's money should go to the Flohrs. The Trustee did not so prove that "any of the property of the corporation was transferred."

The lien statutes of Washington make it clear there was a valid encumbrance upon the property of Williamson at the time of the payment.[10] Mechanics' liens are provided by statute in order to give the furnisher of labor and material, security against the realty so that it is unnecessary to rely upon the personal responsibility of the contractor. The Washington law contains an express declaration that the underlying policy

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ence if it is a transfer of the bankrupt's property * * * But the funds transferred must be from the assets of the bankrupt and result in a diminution of the bankrupt's estate." Cheek vs. Beverly-Wilshire Properties, Inc., 103 F.Supp. 913, 914. "What difference then does it make whether the checks were handed directly to the bank, or that they went through the form of having Adam indorse the insurance company's check, as well as Bert's own check which had been drawn payable to Adam? * * * The form is immaterial. Indeed, the very form employed quite conclusively indicates the intent of Bert and Adam to have it appear from the instrumentalities themselves that the funds originated with Bert and passed to the bank, for application on the note, without the purpose or the effect of the money coming, even momentarily, under Adam's actual control." First National Bank of Danville vs. Phalen, 7 Cir., 62 F.2d 21, 22. Although these cases directly involved the bankruptcy statute, which is not technically in issue here, the thoughts above expressed are no less relevant.

[10]"Every person * * * furnishing material to be used in the construction * * * of a * * * building * * * has a lien thereon for the labor performed or material furnished, whether performed or furnished at the instance of the owner or his agent * * *." R.C.W. § 60.04.010.
"The liens created by this chapter shall be preferred to any encumbrance which may attach after * * * the furnishing of the materials." R.C.W. §60.04.050.

shall be carried out by construction in the courts.[11] Also, it is specifically provided that the lien attaches upon the furnishing of the first labor or material.[12] True, the lien can be cut off by condition subsequent: (1) if there is a failure to give the five-day notice to the owner,[13] (2) if the lien notice is not filed within ninety days after completion of furnishing,[14] and (3) if action is not commenced at the time specified.[15] Neglect to take appropriate action within any one of these time periods avoids the lien. On the contrary, the lien is in full force and effect as soon as the material is furnished.[16] It en-

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[11]"The provisions of law relating to liens created by this act, and all proceedings thereunder, shall be liberally construed with a view to effect their objects." R.C.W., Vol. 5, p. 4376, Laws of 1893, ch. 24, § 18.

[12]A casual reading of R.C.W. § 60.04.050 reveals that a lien created under that Act lodges and gains its preferential rights at the "commencement of the labor or the furnishing of the materials," and not later.

[13]"Every person, firm, or corporation furnishing materials * * * used in the construction * * * of any * * * building * * * shall, not later than five days after the date of the first delivery * * * to any contractor or agent, deliver or mail to the owner * * * notice in writing * * * stating * * * that such person, firm or corporation has commenced to deliver * * * and that a lien may be claimed * * * No materialman's lien shall be enforced unless the provisions of this section have been complied with." R.C.W. § 60.04.020.

[14]"No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of labor or of furnishing of such materials, a claim of lien shall be filed for record as hereinafter provided, in the office of the county auditor * * *." R.C.W. §60.04.-060(1).

[15]"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim was filed, unless an action is commenced within that time to enforce it * * *." R.C.W. § 60.04.100.

[16]"Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the uuse of the materials furnished * * * that gives the materialman * * * his lien * * *." Van Stone vs. Stillwell & Bierce Manufacturing Co., 142 U.S. 128. "In most of the states * * * the actual use of the materials is not requisite if they are furnished for

cumbers the property without doubt for five days and thereafter unless it is cut off by a failure to give the notice to the owner within the statutory time. And, if notice has been so given, the lien is perfect. It may be cut off by failure to file written notice according to law within ninety days after completion of the work. If this notice is then filed, the lien can still be outlawed if action is not commenced as provided.

Now the Washington "preference" statute provides "the effect of the enforcement" of the transfer "at the time it was" made would enable a creditor to obtain a greater percentage "than any other creditor of the same class." There are two noticeable prerequisites here which do not exist in the payment of the lien by Williamson, even if it were assumed contrary to fact that the fund entered the estate of the debtor: first, "at the time" the transfer was made, there was a valid and existing lien and it could probably have been discharged by the contractor with his own money without creating a preference; and, second, a creditor holding a lien upon the property upon which the contractor is working and which, of course, he must turn over free and clear of liens is not in the same class as any other creditor of the contractor.

It seems implicit in the argument of appellants that, if there were a contract or agreement between the owner and contractor that the money would be paid to

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a particular building or improvement." Jones on Liens, Vol. 2, § 1329. "The lien attaches when the materials are delivered or the work commenced." Homann vs. Huber, 38 Washington 2d 190, 193. See Berger vs. Baist, 165 Washington 590, 602. See also Keene Guaranty Savings Bank vs. Lawrence, 32 Washington 572, 578, wherein it is said: "* * * the date of the actual furnishing of the material governs the inception of the lien."

the Flohrs, then a preference would not result because it would be held by Peterson company in trust, if it be assumed Peterson got actual legal title to the money. But it is obvious, if Williamson sent the money to Peterson with the express direction to pay it to the Flohrs in satisfaction of the lien, that Peterson would be the trustee of an express trust. In this instance, no such direction was necessary. It is clear Williamson was not paying a contractor and taking a chance that the Flohrs would file a lien in due course, as they would have done.

The statutes of Washington supply the place of a contract or express direction. The contractor is clearly made the agent of the owner in relation to the lien. It provides "every contractor * * * shall be held to be the agent of the owner." R.C.W. 60.04.010. Another enactment expressly provides that, under these circumstances, a contractor shall be deemed to have received money paid as this was for the purpose of paying all claims for labor and material supplied "as the agent" of the person with whom the contract was made. R.C.W. 9.54.080. The Supreme Court has upheld a conviction of a contractor who misappropriated money under a sister statute. R.C.W. 9.54.010. State v. Williams, 133 Washington 121.[17] Another act provides that

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[17] "* * * in those states where the fact of agency is the foundation of the lien statute, the corollary statute making the agent criminally liable for misappropriation is held valid, but where the lien statute creates no agency, and the creation of that agency is purely by a criminal act, the result logically follows that a criminal statute in such state would be held unconstitutional." (page 287) Thus is the mechanic's lien law of Washington made distinct from that of California.

In applying the statutes of Washington pertaining to this statutorially created fiduciary relationship, the court said: "It provides that everyone who shall come within the operation of the Mechanic's Lien Law, who shall receive payment on account of his contract, shall be deemed

the contractor is only entitled to money after claims for material and labor have been paid, and permits the owner to withhold from the contractor the money to pay such claims where an action has been filed thereon. R.C.W. 60.04.110.

The texture of the state statutory law[18] is such that there seems little doubt about interpretation. Furthermore, it is the duty of this Court, so far as possible, to forecast the decision of the courts of the State of Washington. From the interpretation of these statutes, which are embedded in the reports,[19] it appears that the pay-

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to receive it as the agent of the party with whom the contract was made, and for the purpose of paying the claims for which liens might be filed * * * The contractors are not being punished for any debt they may owe their contractee, by reason of the receipt of the contract price or any part thereof, but they are being punished for their fraud, which is an altogether different matter." (page 286)

The Court expressly relies upon Pauly vs. Keebler, 175 Wisconsin 428, 185 N.W. 554, construing a statute which, like that of New York, places a trust on the contractor. It is said in that case: "When the contractor receives the money from the owner, he owes a duty to the third persons whose labor and materials have enabled him to obtain that money. * * * it refers to all persons who may be entitled to claim the benefit of the lien law * * * Nor do we think the Legislature could have intended that the clause should be construed so strictly as to include only those who had actually filed the notice of lien at the time of the diversion of the trust funds."

[18]The other federal statutes were inapplicable. At the time of filing of the petition in bankruptcy, there was no lien because it had been discharged by payment. Therefore, Section 67(b), requiring a lien recognized thereunder to be "perfected," has no applicability. Section 1(28) of the Bankruptcy Act defining "Secured Creditor" to include one "who has security for his debt upon the property of the bankrupt" is not involved either. Flohrs are not claiming under this section, and the Trustee relies solely on the state preference statute.

[19]San Mateo Feed & Fuel Co. vs. Hayward, 9 Cir., 149 F.2d 875, heavily relied upon, is triply inapplicable here. First, the case arose within four months of bankruptcy and was therefore governed by the provisions of that Act. Second, the decision necessarily involves a construction of the lien law of California, which is, as we have seen, different from that of Washington. Third, the case seems to overrule with-

ment of Williamson would be held never to have entered the estate of Peterson company, but, if it did, the legal title thereto was held in trust to be paid to the Flohrs.

This Court has had difficulty in dealing with the payment by Williamson because the matter was decided upon motion for summary judgment. If the issues had been tried, there would have been no difficulty in ascertaining the facts relied upon by the trial court from the findings. But, as to that payment, no fact shown in the record militates against the holding of the trial judge. The Trustee had the burden of proving the elements of voidable preference.[20] Upon this feature, therefore, the trial judge was correct in determining there was no genuine issue as to a material fact.

As to the Favre account, it may be that there were sufficient bases[21] for the conclusion of the trial court under the state law. This Court is of opinion that there

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out mentioning two other cases previously decided by this Court. See Malott & Peterson vs. Street, 9 Cir., 4 F.2d 770, and Street vs. Pacific Indemnity Co., 9 Cir., 79 F.2d 68.

[20]The Trustee did not produce any proof that there was "a transfer of any of the property of such corporation [Peterson Bros.]" as required by R.C.W. § 23.48.010(3) and did not prove that "the effect of the enforcement of which 'transfer' at the time it was * * * made" "would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class." There was no proof that any of the property of Peterson & Co. was transferred to pay off the lien of Flohrs. Even if this were proved, there still would be no proof that, "at the time" the transfer was made, a valid right enforceable in subrogation would not be acquired. There was no proof that any other creditor of Peterson & Co. was "in the same class' as the Flohrs.

[21]An exchange of values constitutes no preference. Even if the bankrupt did make the payment to Flohrs on the Favre account, he may have merely replaced his monetary assets thereby expended with a right of action against the owners for the same amount. His assets, although in different form, would then stand undiminished.

were genuine issues of material fact which could not be decided on summary judgment.[22]

The answer of defendants says the payment was made out of trust funds[23] in the hands of Peterson. This allegation is taken as denied. While it may be only a legal conclusion, yet we cannot clearly say the allegation is not one of ultimate fact. In interrogatories propounded to defendants by plaintiff, they were asked, in effect, "Where was this trust fund?", and defendants answered, "In Peterson's possession."

On the Favre account-payment by Peterson, in our view, the parties, unwittingly, of course, misled the trial court into thinking the case was ready for summary judgment. But a case is not necessarily ready for summary judgment just because both sides move for it. It should be pointed out, in addition to the trust fund issue, at the moment of summary judgment there was still an issue left over the allegation of plaintiff that the questioned payment was such as to enable Flohr to obtain a greater percentage of the indebtedness due to defendants than any other creditor of the same class. This was denied. We think the facts on the Williamson check were sufficiently developed otherwise to permit a ruling, but we doubt it as to the Favre job payment.

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[22]Zig Zag Spring Co. vs. Comfort Spring Corporation, 89 F.Supp. 410, 413; Griffeth vs. Utah Power & Light Co., 9 Cir., ... F.2d .....

[23]"Transfer in obedience to specific equity; * * * In the case of a recognizable equity, as where the debtor holds an asset upon an express trust, there can be no question as to the rights of the transferee. Neither a judgment creditor nor a trustee in bankruptcy has the status of a bona fide purchaser * * * If, then, the creditor conforms to the terms of his trust without compulsion, the creditor cannot complain, nor is any grievance to be asserted by the trustee in bankruptcy." Garrard Glenn, Fraudulent Conveyances and Preferences, Revised Edition, Volume One, Ch. XVI(B), §291(a).

It might be that, upon full development of the facts, it would be found that Favre paid traceable funds to Peterson upon a distinct understanding as to their disposition in payment of the lien upon property of Favre, or that the contractor was bound by his general contract to pay the lien, or facts might show that the payment by Peterson to the Flohrs was dictated by the applicable law or that Favre had made payments to the contractor with the implied intent that the latter should apply these generally.

Since the issues are remanded for trial, no solution of these is here suggested except as the principles above developed may be applicable to the facts found.

A substantial question briefed here involves statutory limitations. The trial court was of the opinion and ruled that the two-year period of limitation provided by 11 U.S.C.A. §29(e) was applicable.

Defendants contended and now contend that the exercise of the right created by state statute was subject to the Washington limitation of six months from the date of application for the appointment of a receiver. We agree with the District Court that the matter is concluded by Schneidmiller v. Engstrom, 9 Cir., 177 F.2d 196, which affirms Engstrom v. DeVos, 81 F.Supp. 854.

The judgment of the trial court is affirmed as to the payment of $2,424.50. The judgment as to the payment of $730.00 will be vacated for proceedings not inconsistent with this opinion. Each party shall bear his own costs on appeal.

BONE, Circuit Judge, Dissenting

I disagree with Judge Fee on several propositions of law expressed in his prevailing opinion and therefore dissent.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jun. 23, 1955. Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. J. JACKSON, as Trustee in Bankruptcy of Dale R. Peterson & Co., Inc., *Appellant*, vs. E. FIRMIN FLOHR, EDWARD W. FLOHR, and L. CARLOS FLOHR, doing business as Flohr & Co., Metal Fabricators, *Appellees.*	No. 14293

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that that part of the judgment of the said District Court in this cause as to the payment of $2,424.50, be, and hereby is affirmed; that part of the judgment as to the payment of $730.00, is vacated and that this cause be, and hereby is remanded to the said District Court for proceedings not inconsistent with the opinion of this court, each party to bear his own costs on appeal.

(ENDORSED) Judgment
Filed and Entered: June 23, 1955
PAUL P. O'BRIEN, Clerk.

APPENDIX C

Mechanincs' Lien Law

Revised Code of Washington:

60.04.010 *Lien authorized — Bond by railroad company.* Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of a mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim or stone quarry, has a lien thereon for the labor performed or material furnished, whether performed or furnished at the instance of the owner or his agent; and every contractor, subcontractor, architect, builder or person having charge of the construction, alteration, or repair of any property subject to such lien, shall be held to be the agent of the owner for the purpose of establishment of the lien.

Whenever a railroad company contracts with any person for the construction of its road, or any part thereof, it shall take from the contractor a good and sufficient bond, conditioned that he will pay all laborers, mechanics, and materialmen and persons who supply such contractor with provisions, all just dues to such persons or any person to whom any part of the work is given, incurred in carrying on the work, which bond shall be filed by the company in the office of the county auditor in each county in which any part of the work is situated. If the company fails to take such bond it shall be liable to the persons herein mentioned to the

full extent of all such debts so incurred by the contractor.

60.04.020 *Notice that materialmen's lien may be claimed.* Every person, firm or corporation furnishing materials or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other building, or any other structure, or mining claim or stone quarry, shall, not later than five days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail to the owner or the reputed owner of the property on, upon or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No materialmen's lien shall be enforced unless the provisions of this section have been complied with.

60.04.030 *Property subject to lien.* The lot, tract, or parcel of land upon which the improvement is made or the property is situated, or so much thereof as is necessary to satisfy the lien for labor, materials, or supplies and the judgment thereon, to be determined by the court on rendering judgment in a foreclosure of the

lien, is also subject to the lien to the extent of the interest of the person, who, in his own behalf, or who, through any of the persons designated in RCW 60.04.010 to be agent of the owner, caused the performance of the labor, or the construction, alteration, or repair of the property.

60.04.050 *Priority of lien.* The liens created by this chapter shall be preferred to any encumbrance which may attach after commencement of the labor or the furnishing of the materials and are also preferred to any encumbrance which may have attached previously to that time, but which was not filed or recorded so as to create constructive notice thereof prior to that time, and of which the lien claimant had no notice.

60.04.060 *Claim — Contents — Form — Filing.* (1) No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated. Such claim shall state, as nearly as may be, the time of the commencement and cessation of performing the labor, or furnishing the material, the name of the person who performed the labor, or furnished the material, the name of the person by whom the laborer was employed (if known) or to whom the material was furnished, a description of the property to be charged with the lien sufficient for identification, the name of the owner, or

reputed owner if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interest of third parties shall not be affected by such amendment. A claim for lien substantially in the following form shall be sufficient:

..... claimant, vs. .....

Notice is hereby given that on the ..... day (date of commencement of performing labor or furnishing material) ..... at the request of.....commenced to perform labor (or to furnish material to be used) upon ..... (here describe property subject to the lien) of which property the owner, or reputed owner, is ..... (or if the owner or reputed owner is not known, insert the word "unknown"), the performance of which labor (or the furnishing of which material) ceased on the ..... day of .....; that said labor performed (or material furnished) was of the value of ..... dollars, for which labor (or material) the undersigned claims a lien upon the property herein described for the sum of ..... dollars. (In case the claim has been assigned, add the words "and .....

..... is assignee of said claim," or claims, if several are united.)

....., Claimant.

State of Washington, County of....., ss.

....., being sworn, says: I am the claimant (or attorney of the claimant) above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

.....

Subscribed and sworn to before me this ..... day of .....

.....

Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lienor, respectively, shall be stated: Provided, It shall not be necessary to insert in the notice of claim of lien provided for by this chapter any itemized statement or bill of particular of such claim.

(2) Owner may record a notice of lien claimants. The owner may within ten days after there has been a cessation of the performance of such labor or the furnishing of such materials thereon for a period of thirty days, file for record in the office of the county auditor, in the county where the property is situated, a notice setting forth the date on which cessation of the performance of such labor or the furnishing of such materials occurred together with his name, address and the nature of his title, a legal description of the property and a statement that a copy of this notice was

delivered or mailed to the general contractor, if any. The notice must be verified by the owner or by some person in his behalf. Where the ownership of the property is in several persons any one or more of the several owners may execute and file such notice, but the notice must state the names, addresses and nature of title of all of such owners. Such notice shall be conclusive evidence of such cessation of the performance of such labor or the furnishing of such materials on or before the date of cessation as stated in said notice, unless controverted by claimant's claim of lien which must be recorded within sixty days from the date of recording of such notice by the owner. This provision shall not extend the time for filing lien claims as provided by subsection (1) of this section.

(3) Where such labor is performed or such materials are furnished in the construction of two or more separate residential units the time for filing claims of lien against each separate residential unit shall commence to run upon the cessation of the performance of such labor or the furnishing of such materials on each such residential unit as provided in this chapter. A separate residential unit is defined as consisting of one residential structure together with any garages or other outbuildings appurtenant thereto.

60.04.070 *Recording.* The county auditor must record the claims and notices mentioned in this chapter in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed.

60.04.100. *Duration of lien — Limitation of action.* No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim was filed, unless an action is commenced within that time to enforce it; or if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit. If the action is not prosecuted to judgment within two years after the commencement thereof, the court may dismiss it for want of prosecution, and such dismissal or a judgment rendered therein that no lien exists, shall constitute a cancellation of the lien.

60.04.110 *Adjustment between owner and contractor.* The contractor shall be entitled to recover upon the claim filed by him only such amount as is due him according to the terms of his contract, after deducting all claims of other parties for labor and materials. In all cases where a claim is filed for labor or materials the contractor shall defend any action brought thereupon at his own expense. During the pendency of the action the owner may withhold from the contractor the amount of money for which the claim is filed. In case of judgment against the owner or his property, he may deduct from any amount due or to become due to the contractor, the amount of the judgment and costs, and if that amount exceeds the amount due to the contractor or if the owner has settled with the contractor in full, he shall be entitled to recover back from the contractor the amount, including costs, for which the lien is established in excess of any sum that remains due from him to the contractor.

60.04.120 *Foreclosure — Parties.* Liens for which claims have been filed, may be foreclosed by action in the superior court of the county in which the claim is filed, in which all persons who, prior to the commencement of the action, have legally filed claims of liens against the same property or any part thereof, shall be joined as parties. No person shall begin an action to foreclose a lien while a prior action begun to foreclose another labor or material lien on the same property is pending, but if not made a party to the prior action, he may apply to the court to be joined as a party thereto, and his lien may be foreclosed in that action. No action to foreclose a lien shall be dismissed at the instance of a plaintiff to the prejudice of another party to the suit who claims a lien.

Criminal Statutes

Revised Code of Washington:

9.54.010 *Larceny, what constitutes.* Every person who, with intent to deprive or defraud the owner thereof—

(3) Having any property in his possession, custody, or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officers, or a person authorized by agreement or by competent authority to take or hold such possession, custody, or control, or as a finder thereof, secretes, withholds, or appropriates the same to his own use or to the use of any person other than the true owner or person entitled thereto; or

9.54.080 *Contractor failing to pay for labor or material.* Every person having entered into a contract to supply any labor or materials for the value or price of which any lien might lawfully be filed upon the property of another, who receives the full price or consideration thereof, or the amount of any account stated thereon, shall be deemed within the meaning of RCW 9.54.010(3) to receive the same as the agent of the party with whom such contract was made, his successor or assign, for the purpose of paying all claims for labor and materials supplied. (1909 c 249 § 352; RRS § 2604)